

May 12, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS & ELECTRIC CO.	)	Docket No. 72-26-ISFSI
	)	
(Diablo Canyon Power Plant Independent	)	ASLBP No. 08-860-01-ISFSI-BD01
Spent Fuel Storage Installation)	)	

NRC STAFF RESPONSE TO SAN LUIS OBISPO MOTHERS FOR PEACE'S
REQUEST TO SUPPLEMENT SUBPART K PRESENTATION WITH NRC STAFF AFFIDAVIT

INTRODUCTION

On April 26, 2008, San Luis Obispo Mothers for Peace ("SLOMFP") filed a request to supplement its detailed summary of facts and arguments on which it intends to rely during oral argument before the Commission with a staff affidavit which was submitted with a summary disposition motion filed before the Presiding Officer designated to consider Contention 1(b).¹ The Nuclear Regulatory Commission Staff ("Staff") hereby opposes SLOMFP's request.

BACKGROUND

The Commission has defined the scope of this proceeding in its decisions admitting SLOMFP's contentions and delegating authority over certain issues to a Presiding Officer from the Atomic Safety and Licensing Board Panel. The Commission ruled that two of SLOMFP's contentions were admissible in part.² Contention 1(b) was admitted to the extent that it alleged that the Staff failed to provide a complete list of source documents or information underlying its

¹ "San Luis Obispo Mothers for Peace's Request to Supplement Subpart K Presentation with NRC Staff Affidavit" ("Supplement Request").

² *In the Matter of Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation) CLI-08-01, 66 NRC ____ (January 15, 2008).

analysis and that the Staff failed to identify appropriate FOIA exemptions for its withholding decisions. *Id.* at 19. Contention 2 was admitted to the extent that it alleged that the Staff failed to consider the potential impacts of non-fatal health effects and land contamination from a terrorist attack. *Id.* at 20. The Commission explicitly declined to permit adjudication of terrorist threat scenarios considered by the Staff due to the necessity of protecting national security information.³

To document its disclosure of references and withholding based on FOIA exemptions, the Staff produced a *Vaughn* index for all of the documents listed as references for the Supplemental EA.⁴ After SLOMFP challenged the completeness of the list and the appropriateness of some of the FOIA redactions,⁵ the Commission delegated this issue to the Presiding Officer designated to rule on certain matters in this case.⁶ Pursuant to the schedule established for that proceeding, the Staff filed a motion for summary disposition of the issues before the Presiding Officer with supporting Staff affidavits.⁷ One of those affidavits addressed SLOMFP's challenge to the completeness of the reference list by explaining that the Staff

³ *Id.* at 24-25 (declining to admit SLOMFP Contention 3); *In the Matter of Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation) CLI-08-08, 66 NRC ____ (April 30, 2008) (declining to admit SLOMFP late-filed Contention 6).

⁴ *NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index* (Feb. 13, 2008); *Addendum to NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index* (Feb. 15, 2008); *Second Addendum to NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index* (April 18, 2008).

⁵ *San Luis Obispo Mothers for Peace's Response to NRC Staff's Vaughn Index, Request for Leave to Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures to Protect Submission of Sensitive Information* (Feb. 20, 2008) ("Response to Vaughn Index").

⁶ *In the Matter of Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation) CLI-08-05, 67 NRC ____, slip op. at 4-5 (March 27, 2008).

⁷ *NRC Staff's Motion for Summary Disposition of Contention 1(b)* (April 18, 2008) ("Staff Summary Disposition Motion").

included a document entitled “Memorandum from Luis A. Reyes to the Commissioners re: Decision-making Framework for Materials and Research and Test Reactor Vulnerability Assessments,” November 24, 2004, “SECY-04-0222” in the reference list because the Staff referred to the consequence evaluation criteria in that document when developing the assumptions used to calculate the dose to the nearest resident for the Supplemental EA.⁸

SLOMFP responded to the Staff’s summary disposition motion by conceding that the reference list was adequate and that Contention 1(b) was resolved.⁹ On the same day. SLOMFP filed a request to supplement its Subpart K presentation before the Commission with the NRC Staff affidavit referenced above. According to SLOMFP, the affidavit supports its claim that the Staff used SECY-04-0222 to arbitrarily exclude consideration of attack scenarios that did not result in immediate fatalities. Supplement Request at 1. Specifically, SLOMFP states that in the affidavit the Staff “conceded” that it applied the decision-making criteria in SECY-04-0222. *Id.* at 2.

DISCUSSION

The Staff objects to SLOMFP’s request to supplement its Subpart K presentation with the affidavit submitted by the Staff in support of Contention 1(b). SLOMFP is attempting to use statements made by the Staff for the limited purpose of showing that the Staff’s reference list was complete and misconstrue them to bolster unfounded claims before the Commission. The Staff denies SLOMFP’s claim that the Staff excluded consideration of threat scenarios that did not result in immediate fatalities when assessing the consequences of a terrorist attack on the

⁸ Affidavit of James Randall Hall, Shana Helton and Paul Kelley, Jr., Attachment 1 of Staff Summary Disposition Motion, at ¶¶ 6-7.

⁹ *San Luis Obispo Mothers for Peace’s Response to NRC Staff’s Motion for Summary Disposition of Contention 1(b)* (April 26, 2008) at 3.

Diablo Canyon ISFSI. SLOMFP should not be permitted to misrepresent the Staff's position by taking a Staff affidavit submitted to establish a limited set of facts in a different proceeding out of context and supplying its own interpretation over the objection of the Staff.

Contrary to SLOMFP's claim that the Staff "conceded" that it applied a decision-making criterion in SECY-04-0222 to eliminate plausible threat scenarios from consideration of the Supplemental EA for Diablo Canyon,¹⁰ the Staff went to some length in its affidavit to explain that its reliance on SECY-04-0222 was actually very limited. The Staff explained that many aspects of the framework methodology outlined in that document were *not used* by the Staff when developing the EA. Staff Affidavit at ¶ 7. While the Staff noted that it *referred* to the consequence evaluation in SECY-04-0222 when developing the assumptions used to calculate the estimated dose to the nearest resident to the Diablo Canyon ISFSI, the Staff did not state that any plausible scenarios were excluded from consideration using the criterion of "early fatalities" as claimed by SLOMFP. *Id.*

The Staff has explained that the NRC determines the plausibility of terrorist threat scenarios based on threat information gathered through regular interactions with law enforcement and intelligence communities. Supplemental EA at 7. In order to obtain a conservative assessment of potential environmental impacts of a terrorist attack on the Diablo Canyon ISFSI, the Staff performed a dose calculation based on the plausible attack that would result in the largest release of radioactive material.¹¹ Thus, the Staff has explained that the plausible scenario with the highest potential consequences was used to assess environmental

¹⁰ Supplement Request at 2.

¹¹ Supplemental EA at 7; Affidavit of Elizabeth Thompson, attached to "NRC Brief and Summary of Relevant Facts, Data and Arguments Upon Which the Staff Proposes to Rely at Oral Argument on San Luis Obispo Mothers for Peace's Contention 2" at ¶ 14.

consequences in terms of potential offsite dose. The Staff has never stated that threat scenarios considered plausible were eliminated from consideration in developing the Supplemental EA based on a criterion involving "early fatalities" and SLOMFP's attempt to create this impression by misconstruing Staff statements should not be permitted. Nevertheless, should the Commission permit admission of the Staff affidavit as requested by SLOMFP, the Staff requests the opportunity to file a responsive affidavit.

CONCLUSION

For the reasons stated above, the Staff opposes SLOMFP's request to supplement its detailed summary of facts and arguments on which it intends to rely during oral argument before the Commission with a Staff affidavit submitted before the Presiding Officer regarding the completeness of the reference list for the Supplemental EA. However, should the Commission grant SLOMFP's request, the Staff requests that the Commission afford the Staff an opportunity to file a responsive affidavit.

Respectfully submitted,

/RA/

Lisa B. Clark
Molly Barkman

Dated at Rockville, Maryland
this 12th day of May, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SAN LUIS OBISPO MOTHERS FOR PEACE'S REQUEST TO SUPPLEMENT SUBPART K PRESENTATION WITH NRC STAFF AFFIDAVIT" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 12th day of May, 2008.

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